

## Royal Treatment: The Crown's Special Status in Administrative Law

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### Abstract

My focus in this paper is on the treatment of the Crown by the courts, especially Canadian courts, in judicial review of administrative action. In three areas of administrative law, the Crown has been accorded a special status, distinct from that of statutory bodies: administrative powers, justiciability and remedies.

In respect of administrative powers, the Crown qua Crown has inherent capacities that are not available to statutory bodies. In respect of prerogative powers, the grounds of judicial review are restricted. In respect of the remedies that courts may grant, these may be more limited when exercises of the prerogative are involved.

In the cases, the special status of the Crown is asserted rather than justified: it is a legal fact is search of a normative justification. The absence of a convincing normative justification for the special status of the Crown in judicial review of administrative action is significant, because the outcome of a case could well turn on whether the power deployed to effect a change in an individual's legal position was exercised by the Crown or by a statutory decision-maker.

My discussion of the three areas leads me to suggest that it should be possible to bring the treatment of the Crown into line with that of other administrative decision-makers without creating serious jurisprudential difficulties.

### Introduction

The Crown remains a mysterious entity in common law thought. H.R.W. Wade wrote that “[t]he legal nature and position of the Crown . . . have been the subject of some remarkably contradictory judicial opinions”; although such questions “ought to be very familiar and well settled,” “the nearer they come to the bedrock of the constitution, the less certain the judges seem to be.”<sup>1</sup> F.W. Maitland's warning that “the crown is a convenient cover for ignorance” remains apposite.<sup>2</sup> So it is that the Crown has been

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<sup>1</sup> “The Crown, Ministers and Officials: Legal Status and Liability” in Maurice Sunkin & Sebastien Payne eds, *The Nature of the Crown: A Legal and Political Analysis* (Oxford: Oxford University Press, 1999) 23 at 23.

<sup>2</sup> *The Constitutional History of England* (Cambridge: Cambridge University Press, 1908) at 418. See further the discussion, below, nn 26-34 of *Canadian Doctors for Refugee Care v Canada*, 2014 FC 651 [*Canadian Doctors for Refugee Care*].

described as a “corporation sole,” but also as a “corporation aggregate”<sup>3</sup> – and if a “corporation” it be, it is one that, by virtue of its imperial history, has many subsidiaries.<sup>4</sup>

My focus in this paper is on the treatment of the Crown by the courts, especially Canadian courts, in judicial review of administrative action (a term I use interchangeably with “administrative law”). As I will demonstrate, through an analysis that will be comprehensive if not necessarily exhaustive, in three areas of administrative law, the Crown has been accorded a special status, distinct from that of statutory bodies: administrative powers, justiciability, and remedies. In respect of administrative powers, the Crown *qua* Crown has inherent capacities that are not available to statutory bodies. In respect of prerogative powers, the grounds of judicial review are restricted. In respect of the remedies that courts may grant, these may be more limited when exercises of the prerogative are involved.

A particular concern is that the special status of the Crown is asserted rather than justified: it is a legal fact in search of a normative justification. It may well be possible to justify the royal treatment of the Crown by the courts, perhaps by reference to the historical evolution of the Westminster-style constitution or, as a political scientist has put it, “a tacit acceptance” by the other branches of government “of the necessity of an effective, discretionary executive” that operates unfettered so long as the legislature declines to enact statutory provisions encroaching on territory occupied by the executive.<sup>5</sup> But any such justification is absent from the decided cases discussed below and, in any event, these justifications go more to the legitimacy of the continued existence of the prerogative (with which I do not quarrel) than to the legitimacy of the distinctions that have been drawn between the Crown and statutory bodies. The absence of a convincing normative justification for the special status of the Crown in judicial review of administrative action is significant, because the outcome of a case could well turn on whether the power deployed to effect a change in an individual’s legal position was exercised by the Crown or by a statutory decision-maker.<sup>6</sup> My discussion of the three

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<sup>3</sup> *M v Home Office*, [1994] 1 AC 377 (HL) at 424, Lord Woolf: “[The Crown] can be appropriately described as a corporation sole or a corporation aggregate”. See also Cheryl Saunders, “The Concept of the Crown” (2015) 38:3 Melbourne UL Rev 873.

<sup>4</sup> See variously *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte The Indian Association of Alberta and others*, [1982] QB 892 (CA); *R (Quark Fishing) v Secretary of State for Foreign and Commonwealth Affairs*, [2006] 1 AC 529 (HL); *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)*, [2009] AC 453 (HL). See generally Peter C Oliver, *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada, and New Zealand* (Oxford: Oxford University Press, 2005).

<sup>5</sup> Philippe Lagassé, “Parliamentary and judicial ambivalence toward executive prerogative powers in Canada” (2012) 55:2 Can Public Administration 157 at 158, citing Harvey C Mansfield, *Taming the Prince: the Ambivalence of Modern Executive Power* (Baltimore: Johns Hopkins University Press, 1993) [Lagassé].

<sup>6</sup> I use the term Crown in a catch-all sense in this paper, much as the courts have tended to do; I am comfortable doing so in light of the confusion I referred to at the outset. I appreciate that finer-grained distinctions may be possible – for instance, between powers inhering in the Crown and powers conferred upon the Crown (or its servants) by statute. But my objective in this paper is not to lay out a taxonomy of

areas leads me to suggest that it should be possible to bring the treatment of the Crown into line with that of other administrative decision-makers without creating serious jurisprudential difficulties.

### **Administrative powers**

The Supreme Court of Canada has been very clear that administrative decision-makers may exercise only those powers granted by statute. A statutory body “enjoys no inherent jurisdiction.”<sup>7</sup> The leading case on the powers of administrative decision-makers is *ATCO Gas & Pipelines Ltd v Alberta (Energy & Utilities Board)*.<sup>8</sup> There Bastarache J. explained that “in the area of administrative law” decision-makers obtain their powers from only two sources: “(1) express grants of jurisdiction under various statutes (explicit powers); and (2) the common law, by application of the doctrine of jurisdiction by necessary implication (implicit powers).”<sup>9</sup>

Bastarache J.’s reference to the common law is apt to mislead. Implicit powers are not free-standing but must be tied to statutory authority. As Lord Shelborne advised, “this doctrine ought to be reasonably, and not unreasonably, understood and applied, and that whatever may *fairly be regarded as incidental to or consequential upon*, those things that the legislature *has authorized* ought not (unless expressly prohibited) to be held by judicial construction, to be *ultra vires*.”<sup>10</sup> Indeed, despite his reference to “the common law,” Bastarache J. took a relatively restrictive view of the permissible scope of implied powers: “the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are *practically necessary* for the accomplishment of the object intended to be secured by the statutory regime created by the legislature.”<sup>11</sup>

Quite how tightly an implied power must be tethered to statute is uncertain. For instance, in *R (New London College) v Home Secretary*,<sup>12</sup> Lord Sumption and Lord Carnwath took different views on this question. For Lord Sumption, the Home Secretary’s authority to change her guidance on immigration sponsorship applications by educational institutions flowed from her “statutory power . . . to administer the system of immigration control,” which “must necessarily extend to a range of ancillary and incidental administrative

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Crown powers. It is to demonstrate that the Crown has a special status that is not readily justifiable, especially because there are important consequences for individuals depending upon the nature of the power used to alter their legal positions.

<sup>7</sup> *AG of Que and Keable v AG of Can et al*, [1979] 1 SCR 218 at 249.

<sup>8</sup> 2006 SCC 4, [2006] 1 SCR 140 [*ATCO*].

<sup>9</sup> *Ibid* at para 38.

<sup>10</sup> *Attorney-General v Great Eastern Railway Co* (1880), 5 AC 473 at 478 (HL).

<sup>11</sup> *ATCO*, *supra* note 8 at para 51 [emphasis added]. For applications of this principle, see *Bell Canada v Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 SCR 1722; *Chrysler Canada Ltd v Canada (Competition Tribunal)*, [1992] 2 SCR 394; *Canadian Pacific Air Lines Ltd v Canadian Air Line Pilots Association*, [1993] 3 SCR 724.

<sup>12</sup> [2013] 1 WLR 2358 (UKSC) [*New London College*].

powers not expressly spelt out. . . .”<sup>13</sup> For Lord Carnwath, however, an implicit power must be “reasonably incidental” to an express statutory power;<sup>14</sup> here, it was an “adjunct” to the “the specific function of providing for entry for study.”<sup>15</sup> But it is clear that, as far as express and implied powers are concerned, a statutory tether is always required.

Where the Crown is concerned, however, the statutory tether can be cast off.<sup>16</sup> Consider *Pharmaceutical Manufacturers Assn of Canada v British Columbia (Attorney General)*.<sup>17</sup> At issue here was the province’s administration of its “largely non-statutory” Pharmacare program.<sup>18</sup> In order to cut costs, the province classified different but “therapeutically equivalent” prescription medications into “reference categories,” creating baseline prices above which patients would not be reimbursed; in exceptional circumstances, physicians could also apply for “special authority” to fully compensate Pharmacare patients for whom more expensive medication was prescribed.<sup>19</sup> There were “no regulations or statutory provisions governing the process by which categories of drugs are deemed to be therapeutically equivalent, or governing the granting of special authorities.”<sup>20</sup>

Newbury J.A. accepted as a general matter “the general power of government to make executive decisions regarding the expenditure of public funds to which individual members of the public have no enforceable entitlement.”<sup>21</sup> In her view, “the Crown has the capacities and powers of a natural person.”<sup>22</sup> Just as a billionaire could set up a Pharmacare scheme and establish criteria for participation, so too could the provincial Crown.<sup>23</sup> In doing so, the Crown would be subject to the law, in the sense that judicial review of the scheme would be available.<sup>24</sup> But the existence of judicial oversight did not

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<sup>13</sup> *Ibid* at para 28. See also *R v Criminal Injuries Compensation Board, ex parte Lain*, [1967] 2 QB 864 (CA) at 886-87 [*ex parte Lain*].

<sup>14</sup> *New London College*, *supra* note 12 at para 33.

<sup>15</sup> *Ibid* at para 37.

<sup>16</sup> The point is controversial. See e.g. Bruce Harris, “The ‘Third Source’ of Authority for Government Action” (1992) 108 Law Q Rev 626, “The ‘Third Source’ of Authority for Government Action Revisited” (2007) 123 Law Q Rev 225, and “Government ‘Third Source’ Action and Common Law Constitutionalism” (2010) 126 Law Q Rev 373; John Howell, “What the Crown May Do” (2010) 15:1 Judicial Rev 36; Lord Lester of Herne Hill & Michael Weait, “The Use of Ministerial Powers without Parliamentary Scrutiny: the Ram Doctrine” (2003) Public L 415; Adam Perry, “The Crown’s Administrative Powers” (2015) 131 Law Q Rev 652.

<sup>17</sup> (1997), 149 DLR (4th) 613 [*Pharmacare*].

<sup>18</sup> *Ibid* at para 2.

<sup>19</sup> *Ibid* at para 3.

<sup>20</sup> *Ibid* at para 4.

<sup>21</sup> *Ibid* at para 27.

<sup>22</sup> *Ibid*.

<sup>23</sup> *Ibid* at paras 27-28. See also *Attorney General of Quebec v Labrecque*, [1980] SCR 1057 at 1082, Beetz J:

The Crown is also the Sovereign, a physical person who, in addition to the prerogative, enjoys a general capacity to contract in accordance with the rule of ordinary law. This general capacity to contract, like the prerogative, is also one of the attributes of the Crown in right of a province.

<sup>24</sup> See also *McDonald v Anishinabek Police Service* (2006), 83 OR (3d) 132 (CA).

affect the “Crown’s ability to establish Pharmacare in the first place or to restrict it by means of reference-based pricing in the second place.”<sup>25</sup>

More recently, in *Canadian Doctors for Refugee Care v Canada*,<sup>26</sup> the Federal Court held that cuts to refugee healthcare were “cruel and unusual” treatment that violated the *Charter of Rights and Freedoms*.<sup>27</sup> On a preliminary point, Mactavish J. concluded that the funding and consequently the defunding of the healthcare programme for refugees was intra vires the federal executive. No statutory authorization was necessary to support the programme given the broad executive authority accorded to the federal executive under the Canadian constitution. Mactavish J. did not clearly identify the source of the power to fund refugee healthcare. She cited Peter Hogg: “[s]ometimes, the term ‘prerogative’ is used loosely, in a wider sense, as encompassing all the powers of the Crown that flow from the common law . . . [but] [n]othing practical now turns on the distinction between the Crown’s ‘true prerogative’ powers and the Crown’s natural-person powers, because the exercise of both kinds of powers is reviewable by the Courts.”<sup>28</sup> And she seemingly agreed that any potential distinction was unnecessary in this case, because in the absence of clear statutory language, “the Crown’s prerogative power to spend in an area not addressed by statute remains intact. . . .”<sup>29</sup>

Given the broad scope of the Crown’s authority to act as a natural person, it was simply unnecessary to determine whether the refugee healthcare scheme was enacted by virtue of the prerogative or of the Crown’s other common-law powers. This conclusion might, however, be criticized. Prerogative powers follow the constitutional division of powers between the federal government and the provinces.<sup>30</sup> However, “health” “is not an enumerated head” of federal or provincial competence,<sup>31</sup> “but instead is an amorphous topic which can be addressed by valid federal or provincial legislation, depending in the circumstances of each case on the nature or scope of the health problem in question.”<sup>32</sup> Although the federal government’s exercises of its spending power and its criminal-law competence have permitted it to exercise a great deal of authority in relation to healthcare, “health” is not a federal competence and, in general, matters of healthcare provision fall more naturally under the broad provincial competences in respect of hospitals, property and civil rights, and local matters.<sup>33</sup> It might even be argued that the

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<sup>25</sup> *Pharmacare*, *supra* note 17 at para 30.

<sup>26</sup> 2014 FC 651.

<sup>27</sup> Part 1 of the *Constitution Act 1982* (UK), being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 12: “Everyone has the right not to be subjected to any cruel and unusual treatment or punishment”.

<sup>28</sup> *Canadian Doctors for Refugee Care*, *supra* note 2 at para 392, citing Peter Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) (loose-leaf) at 1-19.

<sup>29</sup> *Canadian Doctors for Refugee Care*, *supra* note 2 at para 401.

<sup>30</sup> *Bonanza Creek Gold Mining Company v The King*, [1916] 1 AC 566 (PC) at 580.

<sup>31</sup> *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199 at para 32, LaForest J, dissenting, but not on this point.

<sup>32</sup> *Schneider v The Queen*, [1982] 2 SCR 112 at 142, Estey J.

<sup>33</sup> *The Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, ss 92(7), (13), (14), reprinted in RSC 1985, Appendix II, No 5.

prerogative to establish *ex gratia* healthcare schemes is a provincial competence, which would render the refugee healthcare scheme ultra vires the federal government. There is, of course, a plausible counter-argument to the effect that a refugee healthcare scheme flows from the federal government's authority over immigration.<sup>34</sup> Nonetheless, this constitutional issue only arises if the power is prerogative in nature. If the scheme could be established pursuant to another common-law power, then there would surely be no division-of-powers problem, because the attribution of the "capacities and powers of a natural person" to the federal or a provincial Crown could not be inhibited by the constitutional division of powers. The point is that the distinction could matter and, indeed, may matter more in a different case; Mactavish J.'s ability to glide over the distinction reinforces my observation at the outset that confusion reigns in respect of the Crown.

Despite this quibble, it is clear that the Crown in Canada benefits from some inherent powers that are not granted by statute and that do not necessarily reside in the royal prerogative. It has the capacities of a natural person and, as such, can do those things that a natural person can do. In an incisive recent essay, Adam Perry has cast serious doubt on whether the legal principles just summarized are coherent; in particular, he argues, courts and commentators have tended to conflate permissions (the absence of prohibitions on action) and powers (the ability – including the authority conferred by law – to do something).<sup>35</sup> In any event, such latitude is not afforded to administrative decision-makers. As statutory bodies, they have no inherent capacities and possess only those powers expressly or implicitly conferred by statute.

The stakes of the debate about inherent powers were well explained by Carnwath L.J. in *Shrewsbury & Atcham Borough Council v Secretary of State for Communities & Local Government*.<sup>36</sup> The discussion there focused on the powers of the Crown, rather than those of statutory bodies, but provides a useful entrance point to the discussion. Carnwath L.J. took the view that "the powers of the Secretary of State are not confined to those conferred by statute or prerogative, but extend, subject to any relevant statutory or public law constraints, and to the competing rights of other parties, to anything which could be done by a natural person."<sup>37</sup> He relied on the decision of the Court of Appeal in *R v Secretary of State for Health ex parte C*,<sup>38</sup> where the respondent's power to maintain a non-statutory list of sex offenders was upheld. But he was critical of this decision. In his view, any category of so-called inherent powers "is exceptional, and should be strictly confined": "As a matter of capacity, no doubt, [the Crown] has power to do whatever a private person can do. But as an organ of government, it can only exercise those powers for the public benefit, and for identifiably 'governmental' purposes within limits set by

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<sup>34</sup> *Ibid.*, s 91(25).

<sup>35</sup> "The Crown's Administrative Powers" (2015) 131 Law Q Rev 652 [Perry, "Administrative Powers"].

<sup>36</sup> [2008] EWCA Civ 148 [*Shrewsbury & Atcham Borough Council*].

<sup>37</sup> *Ibid.* at para 44.

<sup>38</sup> [2000] 1 FLR 627 (CA) [*Ex parte C*].

the law.”<sup>39</sup> Although Carnwath L.J. was concerned there with the Crown and not a statutory body, similar concerns arise in the latter case. On the one hand, to operate effectively statutory bodies must be able to use a wide variety of powers that have not specifically been granted to them. On the other hand, any such additional powers cannot be unlimited; more to the point, unless they are expressly granted or necessarily implicit in specific statutory grants of authority, they cannot be used to “coercive” effect<sup>40</sup> (that is, to modify the legal position of a subject against her will), can only be used to support the attainment of statutory objectives and their exercise must otherwise respect the law.

There is no doubt that this is “a difficult question with far-reaching constitutional implications,”<sup>41</sup> but in my view there is at least an argument for extending the same judicial generosity for inherent Crown powers to administrative decision-makers more generally. Take as a starting point a choice between two different ways of recognizing the powers of statutory decision-makers. One may say that *all* government action (including powers to contract, manage property and so on) must be expressly or impliedly authorized by statute in which case, on the conventional view, only those powers expressly granted by or implicit in a statutory scheme can be used to coercive effect. This is the conventional view laid out by Bastarache J. in the *ATCO* case. Alternatively, one may say that there are three categories of authority: express, implicit, and inherent, the last of which cannot be used to coercive effect.

On its face, option one may seem more attractive because it limits the powers that statutory bodies can claim, whereas option two seems to give them an additional category of powers. Probing further, however, casts doubt on the *prima facie* appeal of option one. The key question is the identification of implied powers. Does the test for an implied power require that the power should be *necessary* to give effect to express statutory provisions, or simply that it should be *reasonably incidental* to the express provisions?

Those who choose option one might prefer a test of necessity to a test of reasonableness because it makes coercive action harder to justify by limiting the range of powers that may be used coercively. But if one takes option one and insists that coercive action must be expressly or implicitly authorized, one will often have to strain to imply a power to carry out a wide range of activities not expressly provided for in statute. As long as “[t]he complex process of government includes a vast amount of work in relation to the formulation of policy, drafting new legislation and preparing for its implementation,”<sup>42</sup> judges responding to the felt necessities of administration can be expected to try to accommodate the practical needs of government, including the recognition of powers to contract and manage property. For this reason, the introduction of “any limiting principle” designed to cabin administrative powers would risk being “so wide as to be of

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<sup>39</sup> *Shrewsbury & Atcham Borough Council*, *supra* note 36 at paras 47-48.

<sup>40</sup> *New London College*, *supra* note 12 at para 28.

<sup>41</sup> *R (Hooper) v Secretary of State*, [2005] 1 WLR 1168 (HL) at para 6, Lord Nicholls of Birkenhead.

<sup>42</sup> *Shrewsbury & Atcham Borough Council*, *supra* note 36 at para 73, Richards L.J.

no practical utility or would risk imposing an artificial and inappropriate restriction upon the work of government.”<sup>43</sup> Put simply, one who chooses option one will find herself drawn in practice to a test of *reasonably incidental* rather than *necessary*. If the test for implied powers is that they merely be *reasonably incidental*, a great deal of coercive action becomes possible.<sup>44</sup> Casting the net of implied powers wide will legitimate a broad range of governmental action that infringes individuals’ rights and interests. By contrast, a test of necessity would constrain coercive government action.

Rather than straining to shoehorn the many varieties of administrative action into the categories of express and implied powers, judges and jurists would be better to recognize that there are express powers, accompanied by powers *necessarily implicit* in the statutory scheme, and also a residue of inherent powers *reasonably incidental* to statutory functions, which can be used to write contracts, hire staff, issue guidelines and so on; in short, to enable those bodies to fulfil their statutory objectives more effectively.<sup>45</sup> But where a statutory body wishes to change an individual’s legal position without her consent, the power employed would have to be express or necessarily implicit.<sup>46</sup>

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<sup>43</sup> *Ibid* at para 74, Richards LJ.

<sup>44</sup> The situation may become even more grave when there is general legislation (such as, for instance, section 7 of the *Financial Administration Act*, RSC 1985, c F-11) that grants administrative powers in broad terms, for any coercive action might (in principle) be authorized by virtue of being reasonably incidental to a broad grant of authority; a very wide range of coercive action would thus be justified (although the drafter of the *Financial Administration Act* might well have doubted this, for section 7.2(5) provides that the Treasury Board has “the capacity of a natural person,” thereby suggesting that the body’s inherent powers spring from a different source than the general sources provided for in broad terms in section 7). A more restrictive necessity standard would limit the range of powers that could be used by reference to broad grants of authority; additional powers would be recognised as inherent, on my approach, exercisable only in a non-coercive fashion. There would undoubtedly be difficult questions of interpretation in situations where broad statutory powers and inherent statutory powers co-existed (though in the case of the *Financial Administration Act*, a distinction has apparently been made in those terms by the drafter): see also *Canada (Prime Minister) v Khadr (No 2)*, 2010 SCC 3 at para 35, [2010] 1 SCR 44, discussed in Lagassé, *supra* note 5 at 166 [*Khadr (No 2)*].

<sup>45</sup> This analysis differs slightly from Adam Perry’s analysis of the Crown’s administrative powers. Perry argues persuasively that certain powers of the Crown exist by virtue of community acceptance: “Ultimately, the Crown’s non-legal powers derive from our willingness as a community to attribute ordinary acts to the Crown”: Perry, “Administrative Powers”, *supra* note 35 at 663. It is doubtful, however, that community acceptance would justify the attribution to statutory bodies of inherent powers that go beyond those reasonably incidental to the achievement of statutory objectives. Indeed, in his discussion of the Crown’s administrative powers, Perry leaves open the possibility that these too may legitimately be restricted to those that serve identifiably governmental purposes: “it might be thought that the Crown is capable only of acting in ways that promote governmental purpose” (*ibid* at 667, fn 73). See also *Shrewsbury & Atcham Borough Council*, *supra* note 36 I tend to agree with Perry on this point. The imposition of such a limit would do much to put statutory bodies and the Crown on a similar footing as far as the extent of their respective inherent powers is concerned.

<sup>46</sup> There may, in addition, be some rights and interests that can only be interfered with where there is express statutory authority to do so, as *per* the ‘clear statement’ rule: *R v Secretary of State for the Home Department, ex parte Pierson*, [1998] AC 539 (HL).



The *New London College* case juxtaposes options one and two quite nicely. Lord Carnwath went with option one and, predictably, a test of *reasonably incidental*.<sup>47</sup> He tied the issuing of mandatory guidance as to the criteria for becoming a sponsor to a specific provision in the *Immigration Act, 1971*; it was an “adjunct” to the statutory power to regulate admissions for the purposes of study.<sup>48</sup> Perhaps notably, Lord Carnwath’s reliance on a test of reasonableness allowed him to imply a power to *revoke* any licences granted;<sup>49</sup> a more robust test of necessity might have required an express power to grant and revoke given the obvious detriment caused by revoking licences.

By contrast, Lord Sumption was more adventurous. For him, the issuing of guidelines could be understood as flowing from the Home Secretary’s general power under the legislation: “the statutory power of the Secretary of State to administer the system of immigration control must necessarily extend to a range of ancillary and incidental administrative powers not expressly spelt out in the Act, including the vetting of sponsors.”<sup>50</sup> Subject to a caveat I will discuss momentarily, this is in line with option two. The Home Secretary has inherent powers, just as an “Educational Institutions Immigration Agency” or some similar creature of Parliament would have inherent powers. Beyond those powers that are express or implied, there are other ancillary powers available to the Home Secretary in the discharge of her statutory functions, as long as these powers are reasonably incidental to the attainment of statutory objectives. Quite properly, however, the last category of powers is not “unlimited”<sup>51</sup>:

The Secretary of State cannot adopt measures for identifying suitable sponsors which are inconsistent with the Act or the Immigration Rules. Without specific statutory authority, she cannot adopt measures which are coercive; or which infringe the legal rights of others (including their rights under the Human Rights Convention); or which are irrational or unfair or otherwise conflict with the general constraints on administrative action imposed by public law.<sup>52</sup>

One can argue that Lord Sumption dismisses too quickly the possibility that the scheme at issue was coercive (especially given the ability to revoke licences) but he at least had to demonstrate that the scheme was not coercive, something Lord Carnwath did not have to do because under option one coercion is justifiable once a power has been implied.

Here is my caveat: the prevailing view in England and Wales is that the “third source” of inherent powers lies in the nature of the Crown as a corporation,<sup>53</sup> but if so, third source powers exercisable by ministers spring from the general existence of the Crown, and the 1971 Act, on which Lord Sumption relied, is entirely irrelevant unless proposed exercises

<sup>47</sup> *New London College*, *supra* note 12 at para 33.

<sup>48</sup> *Ibid* at para 37.

<sup>49</sup> *Ibid* at para 38.

<sup>50</sup> *Ibid* at para 28.

<sup>51</sup> *Ibid* at para 29.

<sup>52</sup> *Ibid*.

<sup>53</sup> *Ex parte C*, *supra* note 38 at 476.

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of third source powers are inconsistent with it. Lord Sumption's analysis has been described as "muddled" for this reason,<sup>54</sup> but it would presumably not be so muddled if the respondent had been a statutory body rather than one of Her Majesty's ministers.

The alternative view that I have been detailing is that all government entities created by statute might enjoy a category of power which is neither express nor implied. Inherent powers, on this reading, spring from the creation of an administrative body and the vesting of statutory authority in it. There are express powers, necessarily implicit powers, and inherent powers that are reasonably incidental to the attainment of statutory objectives. Only express and implicit powers could be used for coercive purposes, inherent powers could not be. Making this doctrinal leap<sup>55</sup> would reduce the range of powers official bodies could use in a coercive manner. In addition, it would ensure a significant degree of consistency<sup>56</sup> in the treatment of Crown powers and those of statutory bodies.

### Justiciability: judicial review of the prerogative

Nowadays, it is trite law that the exercise of the royal prerogative is subject to judicial oversight.<sup>57</sup> To begin with, the existence and scope of prerogative powers are determined by the courts.<sup>58</sup> And more generally the exercise of those powers is subject to judicial review on the ordinary grounds. To the extent that judicial review is unavailable of certain types of executive action it is because of their "nature," not their "source".<sup>59</sup> "Some questions are so political that courts are incapable or unsuited to deal with them, or should not deal with them in light of the time-honoured demarcation of powers between the courts and the other branches of government."<sup>60</sup>

Yet, on closer inspection, the grounds of judicial review of the exercise of a prerogative power prove to be narrower than they are in respect of a statutory power. For instance, there is "a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the *rights*,

<sup>54</sup> Mark Elliott, "Muddled thinking in the Supreme Court on the "third source" of governmental authority" (23 July 2013), *Public Law for Everyone* (blog), online: [www.publiclawforeveryone.com/2013/07/23/muddled-thinking-in-the-supreme-court-on-the-third-source-of-governmental-authority/](http://www.publiclawforeveryone.com/2013/07/23/muddled-thinking-in-the-supreme-court-on-the-third-source-of-governmental-authority/)

<sup>55</sup> I fully recognize that doing so would require a long line of authorities to be at least revisited.

<sup>56</sup> The prevailing view that the Crown has the capacities of a natural person suggests that the Crown's powers would remain wider than those of statutory bodies, but the prevailing view has been criticized and, as noted in note 45 above, the Crown's powers could well be limited to those powers that serve identifiable governmental objectives, in which case the inherent powers of the Crown and of statutory bodies would be treated very similarly.

<sup>57</sup> See also, as to other common law powers, *ex parte Lain*, *supra* note 13 at 888, Diplock LJ.

<sup>58</sup> *Attorney General v De Keyser's Royal Hotel*, [1920] AC 508 (HL).

<sup>59</sup> *Council of Civil Service Unions v Minister for the Civil Service*, [1985] AC 374, at 417, Lord Roskill [*Council of Civil Service Unions*].

<sup>60</sup> *Hupacasath First Nation v Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4 at para 62, Stratas JA. See Andrew Banfield & Greg Flynn, "Activism or Democracy? Judicial Review of Prerogative Powers and Executive Action" (2015), 68:1 Parliamentary Affairs 135 [Banfield & Flynn].

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*privileges or interests* of an individual.”<sup>61</sup> The old distinction between reviewable decisions affecting rights and unreviewable decisions affecting mere privileges<sup>62</sup> has been banished from most areas of administrative law. But not from the review of prerogative powers.

The leading Canadian case remains the judgment of the Ontario Court of Appeal in *Black v Canada (Prime Minister)*.<sup>63</sup> Canadian Prime Minister Chrétien had long been at loggerheads with Conrad Black, whose newspapers had been critical of Chrétien. Chrétien advised the British government not to bestow honours upon Black, who commenced claims against Canada and the Prime Minister, to which the defendants invoked the non-justiciability of prerogative powers. Laskin J.A. accepted that making recommendations about honours was an aspect of the prerogative, which extended to “giving advice on, even advising against, a foreign country's conferral of an honour on a Canadian citizen”,<sup>64</sup> a power properly exercisable by the Prime Minister.<sup>65</sup> But he went on to hold that judicial review of prerogative powers is limited: “the exercise of the prerogative will be justiciable, or amenable to the judicial process, if its subject matter affects the rights or legitimate expectations of an individual.”<sup>66</sup> No rights or legitimate expectations were engaged by the exercise of the honours prerogative:

The refusal to grant an honour is far removed from the refusal to grant a passport or a pardon, where important individual interests are at stake. Unlike the refusal of a peerage, the refusal of a passport or a pardon has real adverse consequences for the person affected. Here, no important individual interests are at stake. Mr. Black's rights were not affected, however broadly “rights” are construed. No Canadian citizen has a right to an honour. . . . The receipt of an honour lies entirely within the discretion of the conferring body. The conferral of the honour at issue in this case, a British peerage, is a discretionary favour bestowed by the Queen. It engages no liberty, no property, no economic interests. It enjoys no procedural protection. It does not have a sufficient legal component to warrant the court's intervention.<sup>67</sup>

The distinction between rights and privileges again featured prominently in a more recent case involving Lord (by then) Black's membership of the Order of Canada: *Black v Advisory Council for the Order of Canada*.<sup>68</sup> Lord Black was convicted of criminal offences in the United States arising out of his stewardship of Hollinger International. He had previously been appointed to the Order of Canada, but his criminal convictions

<sup>61</sup> *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643 at para 14, Le Dain J [emphasis added].

<sup>62</sup> *R v Electricity Commissioners, ex parte London Electricity Joint Committee Company*, [1924] 1 KB 171 (CA) at 205.

<sup>63</sup> (2001), 54 OR (3d) 215 (ONCA).

<sup>64</sup> *Ibid* at para 37.

<sup>65</sup> *Ibid* at para 38.

<sup>66</sup> *Ibid* at para 51.

<sup>67</sup> *Ibid* at paras 60-62.

<sup>68</sup> 2012 FC 1234, affirmed 2013 FCA 267 [*Black No (2)*].

jeopardized his continuing membership. Members of the Order of Canada are appointed by the Governor-General on the advice of an Advisory Council. Its procedures are regulated by its Constitution and a “Policy and Procedure for Termination of Appointment to the Order of Canada.” Pursuant to section 3 of the Policy, termination of membership will be considered in certain circumstances.<sup>69</sup> According to the policy, any termination decision must be made fairly and based on all relevant evidence after having ascertained the facts. Provision is also made in the policy for representations to be made by individuals who have been notified that their membership may be terminated.

The crux of the present case was that Lord Black wanted the opportunity to address the Advisory Council in person, and not simply in writing. Clearly, Lord Black was going to be allowed to make representations. The only question was whether he would be confined to the written word. The first hurdle that Lord Black had to overcome was that presented by his previous case. *de Montigny J.* accepted the government’s argument that Lord Black did not have a right which was subject to judicial review:

I fail to see how a person on whom an honour has been bestowed would have any greater right or expectation of keeping it than a person has of receiving it in the first place . . . . The mere fact that a privilege has been conferred, however, absent other external circumstances, does not transform that privilege into a right enforceable in court. Once it is recognized that an honour is granted at the discretion of the Crown and that no one is “entitled” to such an honour, the same must be true of the decision to withdraw it afterwards. That a person may feel his or her reputation will be tarnished by the loss of an honour is no more significant, from a legal perspective, than a person who feels aggrieved by the fact that he or she has not been recognized to be worthy of an honour in the first place. In both instances, the decision is discretionary and highly subjective, based on considerations that have little to do with ascertainable and objective (let alone legal) norms, and for that reason is ill-suited for judicial resolution.<sup>70</sup>

This reasoning nicely illustrates why the distinction between rights and privileges is unworkable. To begin with, there is surely a difference between not receiving an honour – when others might simply think that you had been “passed over” – and being stripped of one – where there can be no doubt that you have been reprimanded. Once an honour has been conferred, it must surely lose its character as a “privilege” and become a “right.” Where before it was a mere possibility, now it has vested, and can only be lost in a very

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<sup>69</sup> Where:

- (a) the person has been convicted of a criminal offence; or
- (b) the conduct of the person
  - (i) constitutes a significant departure from generally-recognized standards of public behaviour which is seen to undermine the credibility, integrity or relevance of the Order, or detracts from the original grounds upon which the appointment was based; or
  - (ii) has been subject to official sanction, such as a fine or a reprimand, by an adjudicating body, professional association or other organization.

<sup>70</sup> *Black (No 2)*, *supra* note 68 at para 51.

public and humiliating fashion. To borrow from Justice Holmes: even Lord Black can distinguish between being stumbled over and being kicked.<sup>71</sup>

Furthermore, the Order of Canada is an aspect of the prerogative to grant honours, but attached to the Letters Patent creating it is a long and detailed Constitution. Determining lawfulness then becomes more a question of interpretation than a question of pure policy.<sup>72</sup> Indeed, de Montigny J. effectively recognized this. Despite his earlier finding that membership in the Order of Canada was a privilege and not a right, he held that Lord Black had a legitimate procedural expectation that he would be allowed to make representations, based on the Policy. This was enough to overcome the justiciability obstacle: “I fail to see how it can be argued that it does not create an expectation that it will be adhered to, or that the steps it prescribes do not provide an objective basis on which courts may be called upon to determine whether the Council has exercised the role assigned to it and followed the procedure according to which it is to fulfill its mandate.”<sup>73</sup> Unfortunately for Lord Black, de Montigny J. concluded that an oral hearing was not necessary “to ensure that his arguments are dealt with fairly”; written submissions would give him “ample opportunity to present his side of the story.”<sup>74</sup> More generally, it is incongruous to adhere for the most part to the distinction between rights and privileges but to permit judicial intervention where a legitimate expectation has been established, which will typically turn on the essentially semantic issue of whether there has been a “clear, unambiguous and unqualified” statement about the procedure the decision-maker will follow.<sup>75</sup>

Even though judicial review of prerogative powers is nominally on the same footing as judicial review of statutory powers, the distinction between rights and privileges continues to play an important – and unhelpful – role in the review of prerogative powers.<sup>76</sup>

Special judicial treatment for prerogative powers is not a uniquely Canadian phenomenon. Consider *R (Sandiford) v Foreign and Commonwealth Secretary*.<sup>77</sup> A British citizen accused by the Indonesian authorities of drug trafficking, an offence that

<sup>71</sup> *The Common Law* (Boston: Little Brown, 1881) at 3.

<sup>72</sup> See similarly *Chaisson v Canada* (2003), 226 DLR (4th) 351 at para 16, Strayer JA:

It is, in my view, arguable that the royal prerogative having been used to create a body (the Canadian Decorations Advisory Committee) to perform a screening function prior to the exercise by the Governor General of her discretion in the grant of honours, that body is bound by the Regulations creating it and its activities may be subject to judicial review. . . . Even if the Committee's ultimate opinion given to the Governor-General under paragraph 8(e) of the Regulations, and the Governor-General's ultimate choices, are not judicially reviewable, this should not necessarily preclude the Court from reviewing the procedure and criteria followed by the Committee to see if they comply with the Regulations.

<sup>73</sup> *Black (No 2)*, *supra* note 68 at para 63.

<sup>74</sup> *Ibid* at para 85.

<sup>75</sup> *Canada (Attorney General) v Mavi*, 2011 SCC 30 at para 68, [2011] 2 SCR 504.

<sup>76</sup> See also *Drabinsky v Advisory Council of the Order of Canada*, 2014 FC 21, *aff'd* 2015 FCA 5.

<sup>77</sup> [2013] EWCA Civ 581, *aff'd* [2014] UKSC 44 [*Sandiford*].

carries the death penalty in that jurisdiction, wanted the British government to fund her defence. Pursuant to the foreign affairs prerogative, the Foreign Secretary has developed a policy, outlined in a pamphlet entitled *Support for British Nationals Abroad: a Guide*. It contains the following passage:

Although we cannot give legal advice, start legal proceedings, or investigate a crime, we can offer basic information about the local legal system, including whether a legal aid scheme is available. We can give you a list of local interpreters and local lawyers if you want, although *we cannot pay for either*.<sup>78</sup>

In line with the published policy, the respondent refused to defray the applicant's legal expenses.

The question for the courts was whether the published policy fettered the discretion of the minister. At the Court of Appeal, Lord Dyson M.R. concluded that, in matters prerogative, the rule against fettering discretion<sup>79</sup> does not apply.<sup>80</sup> As a previous bench of the Court of Appeal had put it in *R (Elias) v Secretary of State for Defence*, "it is within the power of the decision-maker to decide on the extent to which the power is to be exercised in, for example, setting up a scheme. He can decide on broad and clear criteria and either that there are no exceptions to the criteria in the scheme or, if there are exceptions in the scheme, what they should be."<sup>81</sup> Lord Dyson M.R.'s analysis was endorsed on appeal.<sup>82</sup> Lord Carnwath and Lord Mance put the point this way:

[P]rerogative powers have to be approached on a different basis from statutory powers. There is no necessary implication, from their mere existence, that the State as their holder must keep open the possibility of their exercise in more than one sense. There is no necessary implication that a blanket policy is inappropriate, or that there must always be room for exceptions, when a policy is formulated for the exercise of a prerogative power.<sup>83</sup>

<sup>78</sup> [Emphasis added].

<sup>79</sup> *British Oxygen Co Ltd v Board of Trade*, [1971] AC 610 (HL) [*British Oxygen*].

<sup>80</sup> [2013] EWCA Civ 581 at paras 53-54.

<sup>81</sup> [2006] 1 WLR 3213 at para 191 (CA).

<sup>82</sup> *Sandiford*, *supra* note 77.

<sup>83</sup> *Ibid* at para 62. See also Lord Sumption at para 83:

A common law power is a mere power. It does not confer a discretion in the same sense that a statutory power confers a discretion. A statutory discretionary power carries with it a duty to exercise the discretion one way or the other and in doing so to take account of all relevant matters having regard to its scope. Ministers have common law powers to do many things, and if they choose to exercise such a power they must do so in accordance with ordinary public law principles, ie fairly, rationally and on a correct appreciation of the law. But there is no duty to exercise the power at all. There is no identifiable class of potential beneficiaries of the common law powers of the Crown in general, other than the public at large. There are no legal criteria analogous to those to be derived from an empowering Act, by which the decision whether to exercise a common law power or not can be assessed. It is up to ministers to decide whether to exercise them, and if so to what extent. It follows that the mere existence of a common law power to do something cannot give rise to any right to be considered, on the part of someone who might

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The Court was unanimous in rejecting the application, finding that no legitimate expectation had been established or irrationality demonstrated.

Does this distinction between statutory discretion and prerogative make sense? The distinction is formal and it is underpinned by logic: largesse under the prerogative is entirely in the gift of the executive, something that cannot be said of largesse provided for by statute. In the latter case, the executive cannot ignore the statutory context in exercising its powers.<sup>84</sup> In the former case, the executive is not so constrained (or, at least, has not yet been so constrained).

But in substance, there is less to commend the distinction. Given that the executive has chosen to invoke the prerogative and thereby affect individuals' legal positions, there is much to be said for imposing constraints on its exercise. A positive action invites scrutiny in a way that a failure to act does not. Indeed, the constraint of rationality applies (though the applicant lost on this point).<sup>85</sup>

An additional possible constraint would be a prohibition on enacting a blanket policy. The same considerations that underpin the rule against fettering discretion in the context of a statutory power apply here with equal force: it is unfair to completely shut the door to individual circumstances; and from the point of view of good administration, submissions from individuals might highlight flaws in the policy.<sup>86</sup> And doubtless, the individuals on the receiving (or non-receiving) end of the largesse do not care about its legal provenance. The distinction operates particularly unfairly in a case like *Sandiford*. Deciding to set out a blanket policy that, say, gives everyone the same amount of money or subjects everyone to the same criteria is quite different from deciding to set out a policy of blanket refusal. Not taking account of individual circumstances seems especially likely to lead to unfairness and poor administration in the latter case. In the former case, the executive can at least claim that everyone is better off.

In summary, in the area of judicial review of exercises of the prerogative, the Crown again benefits from a special status. The "royal" source of the power exerts a significant influence on the nature of judicial control, with unfortunate results. Once more, no

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hypothetically benefit by it. Such a right must arise, if at all, in other ways, usually by virtue of a legitimate expectation arising from the actual exercise of the power.

<sup>84</sup> See e.g. *Roncarelli v Duplessis*, [1959] SCR 121 at 140, Rand J; *R v Minister of Agriculture and Fisheries, ex parte Padfield*, [1968] AC 997 (HL).

<sup>85</sup> *Sandiford*, UKSC, *supra* note 77 at paras 67-73.

<sup>86</sup> See *British Oxygen*, *supra* note 79 at 625:

[A] Ministry or large authority may have had to deal already with a multitude of similar applications and then they will almost certainly have evolved a policy so precise that it could well be called a rule. There can be no objection to that, provided the authority is always willing to listen to anyone with something new to say – of course I do not mean to say that there need be an oral hearing . . . . The respondent might at any time change his mind . . . .

normative basis is offered for the special status of the Crown, which is asserted, not explained and still less justified.<sup>87</sup>

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## Remedies

When one turns to remedies against the executive, the same pattern appears. The clearest recent Canadian manifestation is *Canada (Prime Minister) v Khadr (No 2)*.<sup>88</sup> Here, the Supreme Court of Canada concluded that "the remedy sought" by Mr. Khadr was "precluded [in part] by the fact that it touches on the Crown prerogative power over foreign affairs."<sup>89</sup>

Mr. Khadr was a Canadian citizen detained in Guantanamo Bay, Cuba, by the United States, after his capture in Afghanistan by American military forces. In earlier litigation, Mr. Khadr had successfully established that Canadian officials had violated the *Charter* by working with their American counterparts at Guantanamo Bay, in a process that the Supreme Court of the United States determined to be unlawful and which violated Canada's international law obligations.<sup>90</sup> He subsequently sought an order directing the Canadian government to seek his repatriation to Canada. At first instance, O'Reilly J. ordered the executive to "present a request to the United States for Mr. Khadr's repatriation to Canada as soon as practicable."<sup>91</sup> A majority<sup>92</sup> of the Federal Court of Appeal upheld the order as a reasonable exercise of remedial discretion.<sup>93</sup>

On appeal, the Supreme Court of Canada accepted that "Canada's active participation in what was at the time an illegal regime has contributed and continues to contribute to Mr. Khadr's current detention"<sup>94</sup> and also accepted that there was a sufficient connection between the breach of Mr. Khadr's rights and ordering the Canadian government to seek his transfer to Canada. However, "[a] connection between the remedy and the breach is not the only consideration."<sup>95</sup> In particular, "judicial review of the exercise of the prerogative power for constitutionality remains sensitive to the fact that the executive branch of government is responsible for decisions under this power, and that the

<sup>87</sup> Compare Banfield & Flynn, *supra* note 60, who perceive judicial oversight as one accountability mechanism amongst many and welcome the reluctance of the courts to "impose substantive outcomes on the government," trusting instead "that arbitrary action will be limited through the use of proper procedural processes" (*ibid* at 151). I have no objection to courts deferring to the executive when appropriate (see generally Paul Daly, *A Theory of Deference in Administrative Law: Basis, Application and Scope* (Cambridge: Cambridge University Press, 2012)) [Daly]; my target in this paper is the distinction between the Crown and other bodies.

<sup>88</sup> *Khadr (No 2)*, *supra* note 44.

<sup>89</sup> *Ibid* at paras 27, 46. Para 27:(stating the question for resolution), and para 46: (invoking the prerogative as a justification for not granting the remedy sought).

<sup>90</sup> *Canada (Justice) v Khadr*, 2008 SCC 28, [2008] 2 SCR 125.

<sup>91</sup> *Khadr v Canada (Prime Minister)*, [2010] 1 FCR 34 at para 92.

<sup>92</sup> Evans & Sharlow JJA, Nadon JA dissenting.

<sup>93</sup> *Canada (Prime Minister) v Khadr*, [2010] 1 FCR 73.

<sup>94</sup> *Khadr (No 2)*, *supra* note 44 at para 21. See also *ibid* at para 26.

<sup>95</sup> *Ibid* at para 33.



executive is better placed to make such decisions within a range of constitutional options.”<sup>96</sup>

The remedy sought by Mr. Khadr gave “too little weight to the constitutional responsibility of the executive to make decisions on matters of foreign affairs in the context of complex and ever-changing circumstances, taking into account Canada’s broader national interests.”<sup>97</sup> Accordingly, the better remedy was to declare that Mr. Khadr’s rights had been breached and “to leave it to the government to decide how best to respond to this judgment in light of current information, its responsibility for foreign affairs, and in conformity with the *Charter*.”<sup>98</sup>

On one level, this analysis is unproblematic. Mandatory orders that compel the executive to act in a particular way should be a last resort, for separation of powers reasons;<sup>99</sup> and courts should of course be cautious about interfering unduly in complex areas of policy.<sup>100</sup> But these separation of powers reasons and institutional concerns have nothing to do with the prerogative; they relate to the “nature” of the powers, not their “source.”<sup>101</sup> The repeated references in *Khadr (No 2)* to the “prerogative” suggest that its presence weighed independently – and heavily – in the balance against according the remedy that Mr. Khadr sought. Had the Supreme Court of Canada mentioned only “complex and ever-changing circumstances,” and left it at that, its decision would have been more convincing; if prerogative is a synonym for policy,<sup>102</sup> it would be better to use the latter phrase, which does not come encumbered with as much historical and metaphysical baggage.

As it is, the invocation of the prerogative seems to be an attempt, rhetorically, to distinguish *Khadr (No 2)* from some of the Court’s other remedial decisions, with which it sits uneasily.<sup>103</sup> Two decisions provide a particularly useful contrast, because they involved, respectively, a remedy requiring ongoing judicial supervision of government

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<sup>96</sup> *Ibid* at para 37. Nonetheless, it is worth highlighting a comment made by Zinn J, when Mr. Khadr’s case returned to Federal Court after the conclusion of the Supreme Court of Canada proceedings: “In my view, if there is only one available remedy that potentially cures the breach of one person’s Charter rights, then that remedy must be ordered by the Court, even if the order involves the exercise of the royal prerogative.” *Khadr v Canada (Prime Minister)*, [2010] 4 FCR 36 at para 91.

<sup>97</sup> *Khadr (No 2)*, *supra* note 44 at para 39.

<sup>98</sup> *Ibid*.

<sup>99</sup> Peter Cane, “The Constitutional Basis of Judicial Remedies in Public Law” in Peter Leyland & Terry Woods, eds, *Administrative Law Facing the Future: Old Constraints & New Horizons* (London: Blackstone, 1997),

<sup>100</sup> See e.g. Daly, *supra* note 87, ch 3.

<sup>101</sup> *Council of Civil Service Unions*, *supra* note 59 at 417, Lord Roskill.

<sup>102</sup> See e.g. Banfield and Flynn, *supra* note 60 at 149-50.

<sup>103</sup> Kent Roach, Canada’s leading scholar of constitutional remedies, has been particularly forthright in his criticism of *Khadr (No 2)*: see e.g. “‘The Supreme Court at the Bar of Politics’: The Afghan Detainee and Omar Khadr Cases” (2010), 28 NJCL 115 at 143-53; “Enforcement of the Charter – Subsections 24(1) and 52(1)” (2013) 62 SCLR (2d) 473 at 483-84.

and a remedy compelling government to act in a particular way in a polycentric policy setting.

Consider, first, *Doucet-Boudreau v Nova Scotia (Minister of Education)*,<sup>104</sup> where a trial judge who had found that the province had failed to respect constitutionally protected language rights retained jurisdiction over the province's implementation of his detailed order. The majority of the Court considered that "the range of remedial orders available to courts in civil proceedings demonstrates that constitutional remedies involving some degree of ongoing supervision do not represent a radical break with the past practices of courts."<sup>105</sup> Ongoing judicial supervision was appropriate in the instant case, because there was no "suggestion . . . that the court would, for example, improperly take over the detailed management and co-ordination of the construction projects"; rather, its role of "[h]earing evidence and supervising cross-examinations" was "not beyond the normal capacities of courts."<sup>106</sup> This conclusion was sensitive to the fact that the trial judge "was crafting a fairly original remedy in order to provide flexibility to the executive" in respecting the *Charter* right at issue.<sup>107</sup> It would not have been a great leap from *Doucet-Beaudreau* to the remedy proposed by Mr. Khadr.<sup>108</sup>

Consider, next, *Canada (Attorney General) v PHS Community Services Society*.<sup>109</sup> Having reached the conclusion that the refusal to extend an exemption from the operation of federal drug laws to a supervised injection site was a breach of section 7 of the *Charter*,<sup>110</sup> the Court took the view that a declaration would be "inadequate."<sup>111</sup> Rather, it granted "an order in the nature of mandamus,"<sup>112</sup> compelling the minister to exercise his discretion in favour of granting a fresh exemption. Strikingly, its reasons for doing so could easily be transposed to Mr. Khadr's case:

The infringement at stake is serious; it threatens the health, indeed the lives, of the claimants and others like them. The grave consequences that might result from a lapse in the current constitutional exemption for Insite cannot be ignored. These

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<sup>104</sup> 2003 SCC 62, [2003] 3 SCR 3.

<sup>105</sup> *Ibid* at para 73.

<sup>106</sup> *Ibid* at para 74.

<sup>107</sup> *Ibid* at para 85.

<sup>108</sup> Indeed, when Mr. Khadr returned subsequently to Federal Court and successfully argued that Canada was still under an obligation to remedy the breach of his *Charter* rights, Zinn J ordered the executive to propose potential means of curing the breach and "reserve[d] the right[s] to oversee this explorative process, to amend the short time frame set out in the judgment for the steps that are to be taken, and . . . to impose a remedy if none is forthcoming from that process." *Khadr, supra* note 96 at para 94. Zinn J's order was stayed pending appeal. Blais CJ commented that the case raised "many serious issues" and found the retention of jurisdiction "surprising" in the circumstances: *Canada (Prime Minister) v Khadr*, [2012] 1 FCR 396 at para 13. These matters were never fully addressed, however, because the case was ultimately declared to be moot: *Canada v Khadr*, 2011 FCA 92.

<sup>109</sup> 2011 SCC 44, [2011] 3 SCR 134.

<sup>110</sup> *Ibid* at paras 85-94, 126, 136. By, on the one hand, criminalizing the staff of the facility and, on the other, depriving users of life-protecting healthcare.

<sup>111</sup> *Ibid* at para 147.

<sup>112</sup> *Ibid* at para 150.

claimants would be cast back into the application process they have tried and failed at, and made to await the Minister's decision based on a reconsideration of the same facts. Litigation might break out anew. A bare declaration is not an acceptable remedy in this case.<sup>113</sup>

Here, moreover, the decision to grant the exemption was clearly a polycentric one, with effects on the health of drug users, the role of non-profit organizations and the duties of the provincial and municipal police forces. Protection of public health and safety is a complex issue, with high stakes. The principal difference between *PHS* and *Khadr (No 2)* would seem to be the presence of the prerogative in the latter and its absence in the former.

### Conclusion

The special status of the Crown in Canadian administrative law has several important implications.

First, the distinction between Crown powers and those exercised by statutory decision-makers is important in Canada. In the different areas surveyed above, the source of a power rather than its nature puts an individual challenging government action at a significant disadvantage. From the perspective of the individual, this is troubling, because the outcome of a case could turn on the source – or characterization of the source – of a particular power, something quite remote from the merits of an individual's case. Moreover, from the individual's perspective, the source of the power used to modify her legal position is quite irrelevant; what matters is its nature and the effects of the resultant decision.

Second, no normative basis is offered in these decisions for the different treatment accorded to the Crown and other bodies. The special status of the Crown is a legal fact in search of a normative justification. In the absence of such a judicially-offered justification, it would be better to remove the Crown's special status from administrative law altogether. That the legislature has left a field open to the Crown to use its common law powers by failing to enact detailed statutory provisions is cold comfort to individuals disadvantaged by the exercise of such powers who would have had access to judicial redress had the powers been statutory in nature.

Third, an end to special treatment for the Crown in administrative law could be accomplished by putting the Crown and statutory decision-makers on the same footing. As I have outlined, the benevolent approach to Crown powers could be extended to statutory decision-makers; the same rules could easily be made applicable to judicial review of exercises of prerogative powers as are already applicable to statutory powers; and there is no need for super-added caution when remedies for breaches of the law might have an effect on executive prerogatives.

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<sup>113</sup> *Ibid* at para 148.

Even with such incremental reforms to judicial review doctrine, the Crown would remain distinctive in Canadian law. It would remain the font of executive authority. Responsible government would continue to be a primordial principle of Canadian constitutional law. And so on. Putting the Crown and statutory decision-makers on the same footing in administrative law would bring coherence to the Canadian law of judicial review of administrative action without threatening the Crown's distinctive position in the Canadian constitution.

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